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Sheila Stoeller

From: Bob Frisby [Bob@pikx.com]
Sent: Wednesday, May 16, 2007 1:08 PM
To: Mayes-WebEmail
Subject: AZWater/NV

Dear Commissioner Kristin Mayes,

You may find this article regarding the pending decision to take water from Beaver Dam, Arizona to Mesquite, Nevada interesting : <http://cals.arizona.edu/AZWATER/awr/mayjune07/feature1.html> In the article, Michael Pearce, our attorney, shares some ideas that may be helpful for legislation to stop future raids on Arizona's water supply by those in other states.

The Wind River Recourses group is well funded by Jim Marsh, a Las Vegas car dealer and casino owner. Marsh was at the Hearing and told Jack Riley that he will be taking this opportunity to the courts, if he is denied by Arizona Department of Water Recourses Director Gunther. Marsh's group has a lot to gain from a very small investment. The State of Arizona may need some legal assistance in the coming court battle as Marsh has hired the best lawyers to represent his group. If a legal precedent is set, then all of Arizona's water will be at risk for taking by Nevada interests.

Thank you for your support.

Regards,
Bob Frisby

Arizona Corporation Commission
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Arizona-to-Nevada Water Export Plan Proposed, Contested

Arizona Law Allows Exports Under Certain Conditions

by Joe Gelt

As if Arizona did not have enough water-supply worries due to population growth and drought, the state is now contending with an application to transfer groundwater from Arizona to Nevada. Of the varied and perplexing issues the requested out-of-state transfer raises, one the most significant and far-reaching is whether Arizona law can protect state water resources from such transfers.

This is the first time the state water export law has been put to the test; it very likely won't be the last.

The controversy is being played out in a remote, rugged and sparsely populated corner of Arizona, in the far northwest part of the state, an area where Arizona, Nevada and Utah lie in close proximity. Sides in the controversy are drawn along the Arizona-Nevada border, with the Arizona Strip communities of Beaver Dam, Littlefield and Scenic on one side. Population in that area is estimated to be between 4,000 and 5,000, mostly retirees and ranchers. On the other side of the dispute, ten miles away and across the stateline, is the rapidly growing town of Mesquite, Nevada.

Water Determined to be Article of Interstate Commerce

The U.S. Supreme Court was at first supportive of state efforts to restrict the export of water from sources within a state for use outside the state. In

Other players include the Wind River Resources, a Nevada-based Arizona limited liability company, and Virgin Valley Water District. VVWD covers 312 square miles within Clark County, Nevada, serving 18,000 customers, most living in the Mesquite area. It also has provided water to Scenic, Arizona. Some estimates indicate that Mesquite's population could increase to 40,000 in as little as four years.

1908, the U.S. Supreme Court responded to a challenge to a New Jersey statute prohibiting the export of water by ruling that the law did not violate any provision of the U.S. Constitution. The decision, *Hudson County Water Co. v. McCarter*, prompted many states, especially arid western states, to pass laws prohibiting the interstate export of water.

State efforts were checked in 1982 when the U.S. Supreme Court decided *Sporhase v. Nebraska ex. rel. Douglas*. Owning adjoining tracts of land in Colorado and Nebraska, the defendants in the case pumped well water in Nebraska to irrigate land in both states. The State of Nebraska brought suit to enjoin the defendants from exporting groundwater from Nebraska into Colorado without a permit. Court cases followed: the lower court granted the injunction; the Nebraska Supreme Court upheld it; the US Supreme Court reversed the state court's decision on constitutional grounds.

Nebraska law allowed a party to withdraw groundwater from an in-state well and export it to an adjoining state upon receiving a permit from the Nebraska Department of Water Resources. The permit could be issued if the NDWR director determined that the requested withdrawal was (1) reasonable; (2) not contrary to the conservation and use of groundwater; and (3) not otherwise detrimental to the public welfare. Reciprocal rights also were required; i.e., the state receiving the exported water also had to grant rights to transport water for use in Nebraska.

The Court determined that groundwater is an article of interstate commerce subject to congressional regulation. It found that the first three conditions of the Nebraska statute did not impermissibly burden interstate commerce. The Court, however, determined that the reciprocity provision was unconstitutional because it unduly interfered with commerce between Nebraska and adjoining states, and it lacked a conservation or preservation rationale.

Exporting water from Arizona

At issue is whether WRR can export groundwater from Beaver Dam Wash in the Littlefield area across the stateline to Mesquite, Nevada. Although an out-of-state transfer, this would not be an interbasin transfer since the Lower Virgin River hydrographic basin underlies both states.

The proposal calls for WRR to drill three wells in the Mormon Wells area along Beaver Dam Wash, a tributary of the Virgin River, and withdraw high-quality groundwater to pipe to the VVWD in Mesquite. WRR seeks to initially transport 800 acre-feet of groundwater per year, annually increasing the volume until it reaches a maximum of 14,000 acre feet between 2045 and 2055.

The immediate issue is whether Littlefield, Arizona can prevent its groundwater from being pumped to Nevada; the broader issue has to do with Arizona's ability to prevent other such incidents occurring, not only along its border with Nevada, but also along borders shared with the neighboring states of California, Utah and New Mexico.

This is considered a groundbreaking case, taking up an issue that has not yet been addressed, whether an out-of-state applicant can dip into, or more stringently stated, raid Arizona's water resources. A March 4 Arizona Republic editorial stated, "The Wind River proposal is an audacious assault on Arizona's precious groundwater."

This situation which is seemingly made-to-order for controversy did not disappoint. Controversy flared. Opposing the application are mostly residents in the Beaver Dam or Littlefield areas, owners of the area's businesses, houses and land. They fear for their water supplies. Favoring the application are developers in Mesquite, Nevada, and Scenic, Arizona.

Laws pertaining to interstate water transfers

Those whose knowledge about the interstate movement of water is based on the Colorado River and its seven basin states know of the prohibitions and restrictions that can apply to such transfers; they would likely expect that the WRR request would confront formidable legal hurdles. And indeed the request

does in fact meet legal challenges, although how formidable these are is the question. The WRR situation is much different than what confronts the seven Colorado River Basin States as they share the river's resources per a federal compact.

The seemingly obvious solution would be for Arizona to adopt legislation to prohibit out-of-state transfers of water. This, however, is not an option. Whatever legal action Arizona takes must abide by a U.S. Supreme Court ruling that held that groundwater is an article of interstate commerce subject to congressional regulation. States, therefore, cannot regulate it in a manner that interferes with the Commerce Clause. (See above sidebar)

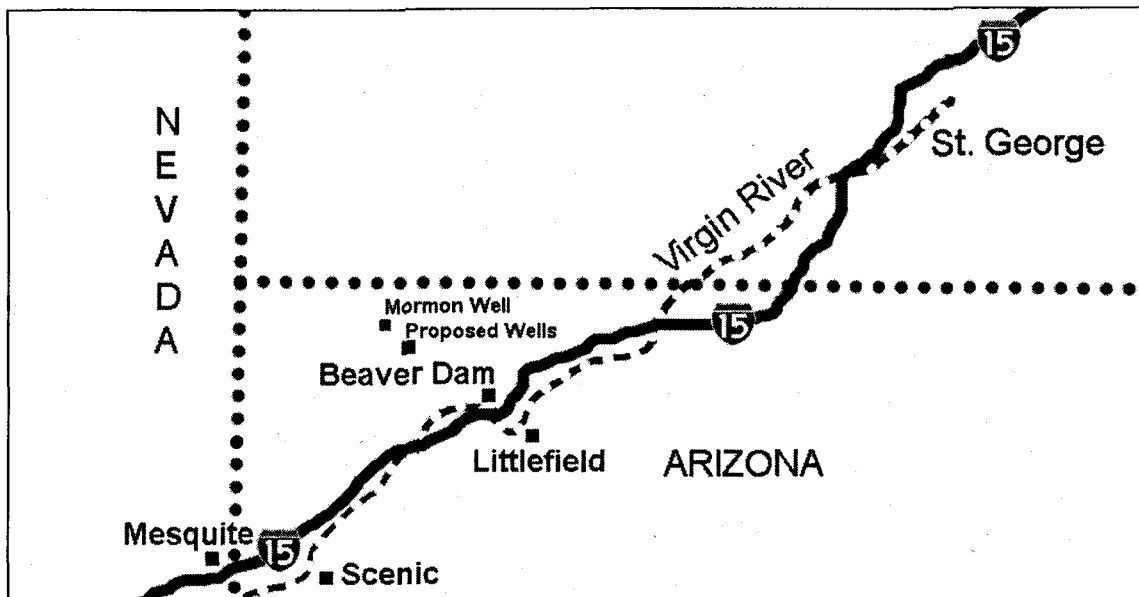
Arizona Revised Statutes § 45-292 states, A person may withdraw, or divert, and transport water from this state for a reasonable and beneficial use in another state if approved by the director pursuant to this article. According to statute the ADWR director decides whether to approve the application after considering such matters as potential harm to the public welfare of Arizona citizens; Arizona's water supplies and its current and future demands statewide and in particular the proposed source area; and the availability of alternative sources of water in the other state.

An initial step was a three-day administrative hearing that began on March 2 conducted at the Beaver Dam High School. The various interests testified before Thomas Shedden, the administrative law judge hearing the case. Closing briefs are due Sept. 7, after which the judge submits his recommendation to ADWR Director Herb Guenther. The director then decides whether or not to approve the application. His decision could be appealed in the courts.

AZ regulatory agencies critical of application

ADWR's position during the administrative hearing was that the application should be denied because WRR failed to prove as required by statute that water diverted to Nevada would be for a reasonable and beneficial use. Further, ADWR contends that WRR failed to demonstrate that diverting the water would not pose a potential harm to the public welfare of Arizona citizens. ADWR does not believe WRR properly studied the possible adverse effects the transfer might have on water supplies of the area, including its wells and stream flow as well as water quality implications. Nor according to ADWR has WRR carefully considered the effect on wildlife, riparian areas, recreation, and the economic viability of the Beaver Dam Wash area.

In its application WRR states its withdrawals from the Muddy Creek Formation would have a minimal impact on water resources and users in the area, claiming that a confining layer separates the aquifer from other water sources. ADWR remains unconvinced, stating that WRR failed to provide site-specific hydrogeologic data or analysis as required by statute.



ADWR also faulted WRR for not demonstrating that alternative sources of water are not available on the Nevada side of the border nor that the current and future water demands of those residing on the Arizona side would continue to be met if the application were granted.

Another state regulatory body, the Arizona Corporation Commission, which has jurisdiction over the quality of service and rates charged by public service utilities, is taking an interest in the water exportation proposal.

ACC Commissioner Kristin K. Mayes says, " We are concerned because there are least four private water companies we believe could be negatively impacted by the proposal. ... They sit upon the aquifer that would be the water source exported into Nevada.

"You can imagine a scenario in which this proposal dewateres the [water companies'] wells and that puts us in the position of potentially having to raise rates to find new sources of water. Not only is that not fair to the existing rate payers, it is not good public policy. The commission does not want to be in the position of having to do that. Or even being asked to do that."

Mayes says ACC commissioners went to Beaver Dam to conduct a public comment session. She says, " We are involved in attempting to protect the public interest in Arizona, and the public interest is not protected by allowing our water company wells to be dewatered by an exportation proposal like this."

Suggested remedies

What strategies might be adopted to protect Arizona's water resources? Michael Pearce, former ADWR chief counsel, suggests that Arizona law could be made more restrictive to prevent out-of-state transfers. He says state law now prohibits transferring water across basin lines. He says, " When we drew the basins we had to stop at the state boundary because we have no business drawing basins in other states. But our basins, for state law purposes, stop at the state lines and Mesquite is across the state line and out of the basin. Not out of the physical basin but out of the legal basin."

He adds. " The basins-end-at-the-border is an important legal concept. If you are going to transport water out of an Arizona basin, different water management standards should apply."

Pearce suggested another possibility. He says, " A state law could be passed that says you can't come into Arizona with the intention of exporting groundwater if what you are trying to do is bolster your water supplies beyond what you could get out of the same basin in your own state. If Arizona had such a law [others] would have to look first to their own resources."

The WRR application was an event waiting to happen, with similar events likely in the offing. Even before WRR's application, Arizona officials were aware that sooner or later they would have to address the issue of out-of-state water transfers. Some view the current situation as a day of reckoning.

An indication of what was to come was a 1990 application that the Mesquite Farmstead Water Association submitted to ADWR to pipe Arizona water over the state line for use in Nevada. The Mesquite utility hoped that for the cost of a relatively short pipeline it could gain access to quality groundwater.

The request attracted strong opposition. Bruce Babbitt who represented an interest in the area at that time went so far as to propose that the Beaver Dam Wash area become an active management area to restrict groundwater pumping. The vigorous opposition from residents in the Littlefield area, however, carried the day, and the application was never acted upon.

Rumor mill churns

Any out-of-state effort to acquire Arizona water would be unwelcomed and likely viewed as impertinent; that the present applicant is Nevada is particularly galling. It is the kind of situation to add grist to the rumor mill.

For example, some opposed to the deal hear a giant sucking sound from the direction of Las Vegas. Suspicions have been voiced that VVWD plans to provide water to the Southern Nevada Water Authority to keep it from exploiting resources in the Mesquite area. Another rumor has it that whatever Arizona water WRR acquires will be pumped into the Virgin River to flow downstream to Las Vegas.

